

THE SERVICES DIRECTIVE'S EFFECT ON CONSUMER RIGHTS

Short Analysis of the Consumer Rights regarding border crossing services and services provided in a different Member State than the recipient's.

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ANNEX (OPTIONAL)

A

Preface

While writing this thesis – I experienced an intensive and exciting period in Vienna. The possibility of focusing on the Services Directive and the four freedoms opened many doors for me.

My supervisor confidently provided me with a fifth freedom, the right to write this thesis with a lot of leeway. This leeway was necessary due to the fact, that most of the research was done in Austria.

A further thank goes to Prof. Mag. Dr. Franz Stefan Meissel, of the University of Vienna for helping me to find contacts in Vienna, Prof. Mag. Dr. Alina-Maria Lengauer for her opinions regarding certain topics within EU law, and most of all Joachim Richter and Philipp Böhler, for reading through the thesis and being a good ”sparring-partners” when it came to ideas.

Vienna, April 2009

1 Introduction

1.1 Topic and problem to be addressed

The background for my choice of topic was a wish to write about EU law in general rather than about EEA law. When my supervisor suggested that I write about the Services Directive, I thought that this sounded exciting, partly due to the fact that the Services Directive has been so disputed, but also because the Services Directive is based to a large extent on the case law of the European Court. The aim of this thesis is to find out in what ways the Services Directive may influence the legal position of consumers. The most difficult part of writing the thesis was to get an overview of the potential problems that might arise and how the Court might eventually solve these¹. Furthermore, I have tried to analyse how the Services Directive differs from the applicable law.

Since the Directive has not yet been implemented, there is obviously no case law to refer to and also few sources to refer to. This makes it difficult to apply a judicial method to the problems to be addressed and to draw definitive conclusions. This necessarily means that the thesis adopts a broad-brush approach to the problems that might arise.

1.2 Delimitations

In the thesis, I will not be considering those parts of the directive that concern the right to establishment. In assessing the material content of the directive, I will focus primarily on those situations that affect the consumer as a recipient of services. However, it is also necessary to focus on the possibilities for the providers of services to provide the service, as this affects the consumer's chance of receiving the service. I will only address the special exceptions in Article 17 briefly, since these are mainly in accordance with the applicable law. The provisions on the right to establishment may have significance for the

¹ Barnard (2007) p. 400 - 406

right to provide services, thus indirectly affecting consumers. However, I have chosen not to deal with these issues in the thesis.

I have chosen to write about EU law in general rather than EEA-law because in this particular area there is little difference between the two and the Norwegian government has already signed up to the directive.

Given the rules of EEA co-operation, Norway will not have any chance of changing the directive. It must be passed as it is shaped by the EU.

1.3 Structure of the thesis

In order to assess how the Services Directive affects the consumers as recipients of services, one must examine the precise scope of the directive. The specific exceptions in Article 17 will also be looked at. I will then look into the individual provisions that affect consumers. By way of introduction, I will deal with the history of regulation of services prior to the directive, since this is what the directive will be compared with and this is where one will see how the directive affects consumers.

The reason I focus as much as I do on the provisions regarding providers of services is that the right to receive services is inextricably linked to the right to provide services. It is not possible to analyse the effects of the directive without taking consideration of the free movement of providers.

1.4 Sources of law

In the exposition of the applicable law, the case law and theory will be relevant sources. Since the directive has not yet been implemented, there is, as previously mentioned, no relevant case law and little literature on the subject. The wording of the directive will therefore be of vital importance, in addition to Community Law. There are also various preliminary works on the directive, such as opinions from legal experts, bodies that are entitled to comment, committees etc. and a proposition from the Commission. The Commission's statement on how the directive is to be interpreted must therefore be given more importance than usually, but even in this case it will not be hugely influential. This is due to the fact that EU law is built on a legal tradition where preparative works do not have

the same importance as in Norwegian law. The directive's preamble will be treated as a type of preparative work². It can be seen as describing the thinking behind the compromise between the different factions and organs within the EU and is therefore, in contrast to the individual statements from, for example, the Commission or a particular committee, to be viewed as an expression of the common will of the legislature. Rights and duties can therefore not be derived directly from the preamble and its draft versions, but they can provide a better understanding of the various concepts in the directive.

2 The background and purpose of the Services Directive

2.1 The historical development of services in the EU

When the European Economic Community (now known as the European Community) was established in 1957, its principal goal was to promote economic progress for the Member States through the establishment of a common market³. This was to be achieved mainly through economic co-operation between the Member States and by eliminating restrictions on the free movements of goods, persons, capital and services. Article 3 of the EEC Treaty lists a number of measures to be taken by the EEC in order to achieve its goals.

Despite the intentions expressed in the EEC Treaty regarding the establishment of a genuine internal market, achieving this has proved to be more difficult and taken more time than was first assumed. This is especially so in relation to the free movement of services. There are several possible reasons for this: Firstly, the free movement of services was not a priority when the EEC Treaty was signed. At that time, the other freedoms contained in the Treaty were given more importance. As a result the Court has played a distinctive role in

² Arnesen (1996) p. 38

³ EEC Treaty Article 2

shaping the law on the free movement of goods from the very beginning, while only developing the law in relation to services in more recent years⁴.

When the provisions for services were passed, the variety of services being offered was smaller and it was most common that services were offered locally. This meant that services were traditionally dealt with together with the right of establishment. Since the transportation options were limited, providing services in another Member State was practically impossible without being establishing there. However, there have been wide-ranging changes within the field of services in recent times. Within the range of application of the free movement of services, a whole range of new services which did not exist at the time the treaty was signed have come into existence. In addition, there have been many improvements in transportation, which have made it easier for both providers and recipients of services to stay in a Member State temporarily either to provide or to receive a service. Internet and telecommunications have further broadened the field of services available. The problems relating to the free movement of services had previously been limited to the right of establishment or to temporarily provide a service in another Member State, while it is now possible to offer services that in themselves are border crossing.

As a result of this, the Court has, in recent times, been more inclined to compare the free movement of services with the free movement of goods. This change of approach is discussed by Sørensen and Nielsen⁵ and is also mentioned by Barnard⁶. How far it goes, is however uncertain.

When it comes to border crossing trade within the community, there have been major developments since the EEC treaty was signed. The field of services has become the driving force behind the economic growth in the EU and now accounts for 70% of the GDP

⁴ ECJ decided 40 cases in the period between 1995-1999, while in the periode of 2000-2005 the Court has decided in over 140 cases based on Article 49, cf. De Witte, *Setting the Scene: How Did Services get to Bolkenstein and Why* (2007)

⁵ Sørensen (2008) p. 650

⁶ Barnard (2007) p. 407

and employment in most of the Member States⁷. Therefore it has become even more important for the EU to take steps to encourage further integration in this field.

2.2 Initiative for the directive

At the EU summit meeting in Lisbon in 2000, the European Council agreed on the Lisbon strategy, with the Services Directive playing a major part in achieving the goal of a more competitive economy. In the report delivered by the Commission two years later, it was noted that legal barriers and a lack of information for both providers and recipients contributed to putting a brake on the free movement of services. The report also found that the majority of providers were small and medium-sized companies. For these, the border crossing provision of services is more difficult than for larger companies due to the expenses involved⁸. This in turn affects consumers, in that they have fewer services to choose from.

2.3 Consumer interests in relation to the common rules on free movement of services.

The Court of Justice has in the past accepted that restrictions on the free movement of services can be justified on the basis of protection of consumer interests. However, certain conditions have to be satisfied before such restrictions on the free movement of services can be implemented.

Firstly, it is a condition that the area in question has not already been harmonised.

Typically, this will be by means of directives whose purpose is to regulate the relevant field of law. Case C-410/90 *Criminal proceedings against André Ambry* can be used as an example of such a situation. The Court first had to consider whether the requirements of the French authorities were in conflict with the directive on package holidays – which they were not – before deciding that they were in conflict with the right to free movement of

⁷ Cf. the 4th recital in the Preamble of the Services Directive

⁸ COM/2002/0441 final

services. The Court then went on to consider whether the interest in consumer protection could legitimate the French requirements⁹.

Secondly, the interests to be protected can not already be ensured in the home state of the provider of services. This will be reviewed in more detail under section 4.3.

Even where both these requirements are fulfilled, Member States are not entirely free to impose restrictions. In several cases, the Court has considered the extent to which measures were necessary to achieve a desired goal. In the case C-410/90 *Ambry* referred to above, the Court came to the conclusion that the measures were too restrictive compared to what was necessary in order to realise the purpose of the measure¹⁰. In case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* the Court declared that the level of protection must also be assessed against the interest of market integration through the free movement of services¹¹.

Finally, mention must also be made of the fact that the Court uses the notion of an “average consumer”¹². Prohibitions, demands of licenses and corresponding measures will therefore readily be perceived as being overly restrictive and unnecessary to protect the interests of a consumer with easy access to information.

2.4 Consumer interests in the secondary legislation

Consumer interests can be further protected through secondary legislation, i.e. through decrees and directives given under the provisions of the EC treaty. The first attempt to create consumer legislation within the EU was passed as early 1975, but it was only followed up to a limited extent¹³. It was not until 1989 that the Council passed a resolution on intensifying the protection of consumers. This can now be found in Article 72 of the EEA Treaty which refers to an attachment. Here we will find among others directives about

⁹ Case C-410/90 *Criminal proceedings against André Ambry*, (Paragraphs 23 and 24)

¹⁰ Ibid (Paragraphs. 35 to 38).

¹¹ C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* (Paragraph 29).

¹² See in this connection Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, (Paragraph 31) where the Court quoted earlier case law characterising the “average consumer [as one] who is reasonably well-informed and reasonably observant and circumspect[...]”.

¹³ NOU-1993-27 Forbrukerkjøpslov chapter 4.

misleading advertising¹⁴, product liability¹⁵, contracts negotiated away from business premises¹⁶, consumer credit¹⁷, unfair terms in consumer contracts¹⁸ and package travels¹⁹. Some of this legislation is general, which means that it applies within all sectors. As an example, the directive about unreasonable conditions in consumer contracts will apply regardless of the sector. Others can be specific to a type of contract, i.e. they only apply within the relevant sector. In this instance, the directive on package tours might serve as an example.

The Services Directive is a general directive. It follows from Article 3 (1) of the directive that if the provisions contained in the directive are in conflict with the provisions of other community legislation, the provisions in the directive will be secondary compared to these. One can therefore not assess the effect of the Services Directive on the rights of consumers without taking into account the ordinary rules on free movement of services and other relevant directives. To the degree that the law is already covered by other directives, the Service Directive has no impact.

3 The right to provide services.

3.1 Introduction

As far as the freedom to provide services in the Services Directive is concerned, it is appropriate to divide the provision of services into three parts as Finn Arnesen did in his article from 2006²⁰.

¹⁴ Council Dir. 84/450 EEC concerning misleading advertising.

¹⁵ Council Dir. 85/374 EEC concerning liability for defective products.

¹⁶ Council Dir. 85/577 EEC to protect the consumer in respect of contracts negotiated away from business premises

¹⁷ Council Dir. 87/102 EEC concerning consumer credit.

¹⁸ Council Dir. 93/13 EEC on unfair terms in consumer contracts.

¹⁹ Council Dir. 90/314 EEC on package travels.

²⁰ Arnesen (2006)

There are three situations within the area that must be distinguished. The first situation is where the provider of services physically moves to the recipient in order to provide the service there.

In this case it is the provider of services who is crossing a border. In the past, this solution was usually most practical in relation to the provisions of services, but this has changed in recent years. The problem to be addressed is what means the host Member State has to deny the service access to its national market and in which ways it can limit the demand for the service by making it less attractive to the recipients. In addition, the question needs to be addressed whether and to what extent the host country can make demands of the providers of services, for example by qualification requirements or requirements to the performance of the services, equipment etc. These questions only arise if the provider of services is actually within the territory of the host State. As a general rule, Member States do not have the possibility to interfere with the provision and performance of services within the territory of other countries.

The second situation is where the service as such is border crossing. Examples of this are commercials in a television programme that is broadcast from another Member State or services provided over the internet. The host country in this situation faces the same problems as where the provider of services is border crossing, with the exception of requirements of qualification and requirements to the performance of the service itself.

The last situation is where the recipient travels to the Member State where the provider of services is based in order to receive the service. The problem that might arise in these situations is whether there is any way for the home country of the recipient to prevent this. The question here is whether it is possible for the recipient to obtain refunds such as healthcare expenses where he or she has received the service in another Member State and whether it is possible to sanction the reception of services that are legally offered in another Member State.

3.2 Applicable law

3.2.1 The concept of restrictions on the free movement of services as developed by the ECJ.

Article 49 of the EEC treaty states that, in principle, restrictions affecting the possibility of a visiting provider of services to provide services are prohibited.

In order to determine whether a national measure forms a restriction on the freedom to provide services, one needs to make a two-step assessment. First, one has to see if the measure constitutes a restriction with regard to Article 49.

Furthermore, according to the case law, a restriction that is based on the public interest will only be allowed to the extent that the restriction is able to ensure that specific interest. The demand of necessity means that for the restriction to be accepted, the interest can not already be protected in the provider's state of establishment. Also, the restriction has to be proportionate. This means that the restriction must be able to ensure the purpose that it is meant to protect, and not go further than is necessary.

As far as the first part of this two-step assessment is concerned, it is worth mentioning that the ECJ has interpreted the concept of a "restriction" in Article 49 comprehensively. Not only does it include all legislative acts issued by public authorities, regardless of whether they are legislation, administrative regulations or decisions, but it also includes discriminating and non-discriminating obstacles to the free movement of services.

3.2.2 Interests that can justify a restriction

In connection with the second stage of the two-step assessment, there are two ways the restrictions can be justified. One set of interests which can justify restrictions are based on the public interest according to Article 55 cf. Article 46. According to these articles, exceptions can be made to the prohibition of restrictions as long as they are justified on grounds of public policy, public security or public health. The second set of interests that can justify exceptions from the prohibition on restrictions can be derived from the precedent cases of the ECJ and are often referred to as the teaching of "imperative requirements in the general interest".

In regard to the free movement of services, the ECJ has recognized a number of interests as "imperative requirements in the general interest". For instance²¹ the protection of workers²², the protection of consumers²³, the environment, general interest in the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of artistic and cultural heritage²⁴, protection of human dignity²⁵, moral and cultural values²⁶.

In connection with the topic of the thesis, it is worth mentioning that the protection of consumers is among the imperative requirements in the general interest that is recognized by the ECJ as an interest that can justify an exception from the prohibition of restrictions. However, it must be said that there are few examples in which the ECJ has lent its support to Member States arguing that their restrictions can be justified by consumer interests.

3.3 Services that are not covered by the directive

Certain services are specifically excluded from the Services Directive. These exceptions can be found in the Articles 2 and 17.

According to Article 2 (1) (a) of the Services Directive, non-economical services of general interest are not subject to the rules of the directive. Recital 17 states that these are services that are not covered by Article 50 of the Treaty and therefore do not fall within the scope of the directive.

Furthermore, Article 2 goes on to list a number of activities that are excluded from the directive, which in fact refers to services that already have been subjected to harmonisation, such as: financial services, electronic communications services and networks, private

²¹ Sørensen (2008) p. 647

²² Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* (Paragraph 18)

²³ Case C-205/84 *Commission of the European Communities v Federal Republic of Germany (The German Co-Insurance Cases)* (Paragraph 30)

²⁴ Case C-154/89 *Commission of the European Communities v French Republic* (Paragraph 17), Case C-180/89 *Commission of the European Communities v Italian Republic* (Paragraph 15), Case C-198/89 *Commission of the European Communities v Hellenic Republic* (Paragraph 21)

²⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (Paragraph 41)

²⁶ Case C-67/98 *Questore di Verona v Diego Zenatti* (Paragraph 38) and Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* (Paragraphs 60 and 61)

security services, services within the field of transport, gambling activities etc²⁷. Most importantly, from our perspective, is that audiovisual services²⁸ and healthcare services are excluded. Healthcare services are excluded from the scope of the directive “*whether or not they are provided via healthcare facilities, and regardless of the way in which they are organised and financed at national level or whether they are public or private*”²⁹.

This means that in relation to healthcare services, the Services Directive has a narrower scope than the approach taken in the case law³⁰.

In addition to the general exceptions in Article 2, there are certain services of general economic interest that are excluded from the scope of Article 16. These can be found in Article 17 of the Directive. Most of these services are already subject to harmonisation, so if they were to be regulated by the Services Directive, in either case the special rules would prevail in case of a conflict as mentioned in Article 3(1), and would therefore not lead to a change in the applicable law.

When it comes to deciding which services are to be regarded as services of general economic interest, Article 1(3) second subparagraph states that the directive does not affect the freedom of Member States to define what services are of a general economic interest and how those services should be organised and financed. What is regarded as a service of general economic interest or economic interests can therefore vary from Member State to Member State.

²⁷ Cf. Article 2 (2) (b to e)

²⁸ This will be further discussed under section 5.2.1.

²⁹ Cf. Article 2 (2) (f)

³⁰ Cf. Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, which is further analysed under section 6.1.1

4 The Member State's ability to regulate the services provided by a visiting provider of services

4.1 Introduction

The topic is relevant in connection with providers of services that wish to come to a different Member State in order to provide a service there. A good example of such a case would be contractors going abroad in connection with larger construction projects.

4.2 Services Directive Article 16

The most important provision when examining the Member State's right to regulate services provided by a visiting provider is the first paragraph in Article 16 of the Services Directive. The first paragraph, first subparagraph states that the Member States are to respect the right of visiting providers of services to provide services. Furthermore, according to the second subparagraph, the Member States are to ensure that the providers of services have free access to and free exercise of a service activity. Finally, the third paragraph requires Member States to refrain from making access to or exercise of a service activity subject to requirements that do not respect the principles listed in point a to c.

The demands in the first paragraph can be viewed as a codification of what the ECJ considers as "restrictions" in regard to Article 49 in the EEC Treaty³¹. This view has also been confirmed by the Commission in the Handbook³².

4.3 Interests that can justify a restriction under the Services Directive

It is primarily in connection with the second stage of the two-step assessment that the Services Directive differs from the current law. In fact, the Services Directive abolishes the concept of "imperative requirements in the general interest" as created by the ECJ in connection with services that are regulated by the directive. As to the Member States' ability to impose requirements on visiting providers of services, Article 16, 1st paragraph, point c mentions that requirements that are imposed must be "justified for reasons of public policy, public security or the protection of the environment". As Article 16 does not

³¹ Magnussen (2008) p. 129.

³² Handbook, section 7.1.2., footnote 106, p. 36.

mention any other interests, it therefore abolishes the Member States' option to impose national requirements on visiting providers of services with reference to the "imperative requirements in the general interest".

In this way, the Services Directive contributes to the principle of mutual recognition laid down by the ECJ, as derived from the Case of Cassis de Dijon³³, becoming even more absolute. In regard to services, this has already been expressed in; inter alia, the Case of Säger³⁴.

The European Court of Justice's principle of mutual recognition creates a presumption that goods and services that are legally offered in the Member State of establishment are also to be offered in other Member States.

In this connection, the statement made by the ECJ in the Case of Säger is quite illustrative. In that case, the Court states that national restrictions imposed on a "provider of services established in another Member State where he lawfully provides similar services³⁵" must be abolished. The idea is that goods and services within the internal market should, in principle, be subject only to the regulations of one Member State, which is the state of establishment. This way, the import state or the host state has to accept the restrictions that are already imposed on the provider of the services in the state of establishment and cannot add to them.

However, the European Court of Justice's principle of mutual recognition creates important limits for when the presumption that services that are legally offered in one Member State are also to be legally offered in different Member States is applicable. In cases where the state of establishment's regulations do not protect important public interests, the host state can, in accordance with precedent case law, impose national restrictions also on the providers of the services established in another Member State. This is the key part of the concept of imperative requirements in the general interest.

³³ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon)

³⁴ Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* See also Case C-33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*.

³⁵ Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.*, (Paragraph 12).

As mentioned, the Services Directive reduces the grounds on which the host State can claim that the principle of mutual recognition should not have an impact. Given that the Member States' freedom of regulation is being limited in this way, the effect of the Services Directive is that the prohibition of regulations will be applicable in more cases than previously. Some restrictions that can at present be upheld by reference to the "imperative requirements in the general interest" will no longer be sustainable after the implementation of the Services Directive.

When it comes to the demands of necessity and proportionality, the regulations in the directive are in accordance with the precedent case law c.f. Article 16 (1), points a to c.

The change in the law brought about by the Services Directive means that the protection of consumers is no longer an interest that can justify an exception from the prohibition of regulations in regard to visiting providers of services.

4.4 Article 16, second paragraph

The Article's second paragraph contains a list of requirements that the Member State cannot impose on the provider of services. This list is also referred to as the "black list"³⁶.

According to point a, the Member States cannot demand that the provider of services have an establishment in their territory. Not only would such a requirement be in conflict with the European Court of Justice's view in the German Co-Assurance Cases³⁷, but it would also mean that, in reality, there was no free movement of services³⁸. In this context, it is stated in point c) that the Member States shall not prevent the provider of services in setting up some sort of facility in their territory.

Furthermore, the Member States cannot, in principle, require that the provider of services obtains an authorization in order to provide services within the territory of a Member State c.f. Article 16 (2) point b. However, Article 18 of the Services Directive opens up the

³⁶ Sørensen (2008) p. 658

³⁷ *Commission of the European Communities v Federal Republic of Germany (The German Co-Insurance Cases)* (Paragraph 27 to 29)

³⁸ Sørensen (2008) p. 658

possibility for Member States to make such a requirement in some situations. This will be further examined under section 5.3.

Nor can the Member State demand that the provider of services has a contractual relationship to his costumers before being granted access to provide the services c.f. Article 16 (2) point d. In other words, the provider of services does not require a customer base before going abroad and setting up his facilities. However, one must still keep in mind the distinction between temporarily providing services and establishment according to the precedent case law.

According to Article 16 (2) point d, the Member State cannot impose restrictions on the providers that prevent them from bringing in materials or equipment, unless the restrictions are necessary for health and safety at work. Since the term “services” includes a broad range of services, this may in some cases mean that the provider of services are dependent on the equipment in order to engage in the activity. However, recital 81 in the directive states that the term “equipment” does not include physical objects which are either

“supplied by the provider to the client or become part of a physical object as result of the service activity, such as building materials, or spare parts...”³⁹”

If we continue to use our example of the building contractor, according to this provision in the Services Directive, he will be able to bring along entrepreneurial machinery, such as cranes, rolling machines etc. However, when working on a construction contract, he will not be able to bring along the materials that are to become a part of the construction.

Finally, the Member State may not restrict the freedom to provide the services referred to in Article 19, c.f. Article 16 (2) point g. This will be further examined under section 6.1.

4.5 Quality of Services

According to the first draft of the Services Directive, the understanding was that the providers of services were to follow the rules of the Member State of establishment exclusively and that the Member State of establishment had the responsibility to control the

³⁹ Cf. 81st Preambular recital.

provider of services cf. Article 16 (1) and (2)⁴⁰. This was called the country of origin principle. The most extreme consequence of this would have been that the providers of services were to follow the rules of the Member State of establishment only, and that the Member State in which the service was provided would have been obliged to acknowledge the legality of the provision of services in accordance with legislation in the Member State of establishment.

Article 16 (3) states that the Member State can impose

“requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment” and are in accordance with the first paragraph of Article 16.

When it comes to visiting providers of services, as mentioned above, the consumer interest is not among the interests that can justify requirements to the performance of the provider. However, other requirements, such as requirements relating to the safety of employees, environmental interests and the like might justify these demands.

4.5.1 Example: Construction Services

In relation to construction services performed by a visiting provider of services, I will use as examples those demands that are made of the performance of the service itself as well as the demands regarding the treatment of the employees of the service provider.

According to Article 50 of the Treaty there is a requirement that the visiting provider of services shall be able to perform the service on the same terms as the citizens in the host State. It follows that a regulation that makes it more favourable to establish oneself in the host state rather than performing as a visiting provider is prohibited. The Services Directive does not differ from the applicable law in this respect. Despite the prohibition of restrictions and discrimination, the Court has accepted that the Member States can justify restrictions based on imperative requirements in the general interest. The case C-58/98 *Josef Corsten* concerned the requirement of a registration in the German registry for craftsmen.

⁴⁰ Arnesen (2006), p. 9.

The court here held that

” It must be acknowledged, as the Commission pointed out, that the objective of guaranteeing the quality of skilled trade work and of protecting those who have commissioned such work is an overriding requirement relating to the public interest capable of justifying a restriction on freedom to provide services.”⁴¹

In this context, it can be mentioned that in Norway there are a lot of requirements that need to be fulfilled in order to carry out electrical installations⁴². For a visiting provider of services, these requirements might result in additional challenges despite the fact that they are qualified to perform the service. This is an example of where the national regulations indirectly make it more favourable for the provider of services to establish himself in the Member State where he wants to provide the service. One of the reasons for the Norwegian regulations is that Norway has a system of power distribution that differs from the rest of Europe. In a case such as this where the system of power distribution is unique, the Member State will probably be able to justify the national regulations as in the interests of public safety.

When it comes to the provider of services' treatment of his employees, article 16 (3) of the Services Directive states that the Member State in which the service is performed shall not be

”prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements”.

This was one of the issues raised in the case C-113/89 *Rush Portuguesa Lda v Office national d'immigration*. The facts here were that a Portuguese entrepreneur had been given a contract by the French railway. The Court stated that the provider of services could freely use his own employees while performing the service in the host country⁴³. However, the Court did not find that the Community law prevented the Member State from imposing its

⁴¹ Case C-58/98 *Josef Corsten* (Paragraph 38).

⁴² Master thesis at UiO (2007) *Grænseoverskridende byggetjenester* p. 107

⁴³ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* (Paragraph 19)

own legislation and collective agreements between employers and trade unions on the employees of the provider of services⁴⁴.

For the host state the result of this is that if there are national rules on a minimum wage for the citizens of the host state, the host state will be able to demand that the visiting provider of services' employees also receives this minimum wage.

5 The service as such is border crossing

5.1 Introduction

The first question that arises is whether there are services which by their very nature can only be offered as a border crossing service. Judicial literature mentions financial services and television commercials⁴⁵ as examples of such services.

Where the service is by its very nature border crossing, the main questions concerning the host country are whether it can deny the services access to the market and what possibilities the host country has to prevent persons and companies based there to demand the service⁴⁶.

Where the service is border crossing, the Court has held that whether the service is legally offered in the country of establishment is crucial. If so, it should also be possible to offer the services to recipients in other EEC countries. The *Säger*⁴⁷ judgment is a good example of this.

An example of where a service is border crossing by its very nature is where the service provider is established in a different Member State within the EEC than the recipient and offers the service without having to physically travel to the recipient's Member State and

⁴⁴ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* (Paragraph 18)

⁴⁵ Joined cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*.

⁴⁶ Arnesen (2006), p. 6

⁴⁷ Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd*

where the recipient of the services does not have to travel to another Member State within the EEC to receive the service from the service provider.

5.2 Quality of services

According to Article 16 of the Services Directive, the Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. In accordance with Article 16 (1) 2nd subparagraph, the Member States shall ensure free access to and free exercise of a service activity. 3rd subparagraph prohibits Member States from imposing requirements on a provider of services such as those mentioned in points (a) to (c).

According to Article 16 (2) (a) the host state cannot require a provider of services to have an establishment in its territory. In the German Co-assurance case⁴⁸, the Court came to the conclusion that the requirement of establishment can be justified by reference to “the imperative requirements in the general interest”, despite finding that on the facts of the case the requirement was not justified. However, in the case C-106/91 *Claus Ramrath v Ministre de la Justice, and l'Institut des réviseurs d'entreprises* the Court found the requirement of establishment was justified. It is difficult to envisage a situation where the requirement of establishment would be justified in relation to a service which is itself border crossing.

According to Article 16 (2) (b) Member States shall not oblige providers to have an authorisation or obtain an entry in a national register in order to provide services. In Case C-205/84 *Commission of the European Communities v Federal Republic of Germany* the Court concluded that in the case of providing insurance services there exists a special need for regulation⁴⁹. The Court further stated that some aspects of the provision of services can legitimise a limit to the free movement of services. In this particular case it was the interests of both the insured and the insurer which provided this legitimacy⁵⁰.

⁴⁸ Case C-205/84 *Commission of the European Communities v Federal Republic of Germany* the Court

⁴⁹ Ibid (Paragraphs 27 to 29)

⁵⁰ Ibid (Paragraphs 30 to 31)

5.2.1 Example: TV broadcasts from a different Member State

In cases where TV programs are broadcast from one Member State into another, the question that arises is to what extent the Member State in which they are received can limit such broadcasts. In the case of *De Agostini*⁵¹ the question was whether a Member State could interfere with a TV commercial broadcast from another Member State⁵². A Swedish company, De Agostini, had bought a slot for a commercial on the Swedish channel TV3 (broadcast from England via satellite) and TV4 (a TV channel based in Sweden) to advertise a children's magazine about dinosaurs. The magazine was printed in Italy in several languages and was published as a series. Each magazine contained one part of a dinosaur puzzle and it was necessary to have every issue of the magazine to complete the puzzle. The Swedish consumer ombudsman acted against the commercial on the basis that it was advertising directed at children. Having considered the television broadcasting directive, the Court found that it only applied to broadcast in a narrow sense, thus excluding commercials⁵³. Looking at the detail of the directive, the Court noted that:

"[...] it follows that, as regards the activity of broadcasting and distribution of television programmes, the Directive, whilst coordinating provisions laid down by law, regulation or administrative action on television advertising and sponsorship, does so only partially.

Although the Directive provides that the Member States are to ensure freedom of reception and are not to impede retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship, it does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes.

Thus the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.

⁵¹ Joined cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*.

⁵² *Ibid* (Paragraph 22).

⁵³ *Ibid* (Paragraph 26).

Consequently, where a Member State's legislation such as that in question in the main proceedings which, for the purpose of protecting consumers, provides for a system of prohibitions and restraining orders to be imposed on advertisers, enforceable by financial penalties, application of such legislation to television broadcasts from other Member States cannot be considered to constitute an obstacle prohibited by the Directive."⁵⁴

As a result, the Member State of the recipient can apply its national rules on misleading advertising broadcast from other Member States, on the condition that the national rules or legislation do not result in secondary control and do not prevent retransmission of television broadcasts coming from other Member States⁵⁵. According to Article 3 (1) (c) of the Services Directive, where there is a conflict between the Services Directive and the provisions of another Community act, such as Council Directive 89/552/EEC concerning the pursuit of television broadcasting activities, the provisions of the latter shall prevail. It further follows from Article 2 (2) (g) that the Services Directive shall not apply to:

"audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting"

The exception contained in Article 2 (2) (g) is explained further in the handbook, which states that:

*"Other services linked to audiovisual services or to radio broadcasting, such as advertising services or the sale of drinks and food within cinemas are not excluded and have to be covered by implementing measures"*⁵⁶.

A literal interpretation of this exception would include television commercials in the scope of the Services Directive. Article 16 (2) (g) of the Service Directive prohibits restrictions aimed at the recipients of services, in this case the advertisers. Despite this, Member States will be able to impose restrictions based on the imperative requirements in the general interest. In *De Agostini*, the restriction was justified by the protection of consumer

⁵⁴ Paragraphs 32 to 35

⁵⁵ Paragraph 38

⁵⁶ Handbook, section 2.1.2, p. 12

interests. However, under Article 16 (3) of the Services Directive, restrictions can only be justified on the basis of public policy, public security, public health or the protection of the environment. The justification in *De Agostini* will therefore no longer apply and Member States will be limited in the extent to which they can impose restrictions on television commercials broadcast from other Member States. Thus, the Services Directive narrows the grounds for imposing restrictions compared to the currently applicable law.

5.3 Additional derogations that can be justified by safety interests

Article 18 (1) of the Services directive creates a right for a Member State, in which the provider of services is not established, to sustain or to implement restrictions in order to ensure that the service is provided safely. However, the provision does not allow restrictions on the free movement of services in general, but only restrictions aimed at certain groups of providers cf. the statement “*a provider established in another Member State*”.

It is rather unclear how far this provision extends. The recitals are not particularly helpful, although recital 91 does state that the Member States shall have the possibility to take measures that derogate from the right of free movement of services in particular cases where the safety of the services provided is at issue. One aspect of this is that in order to protect public policy, public security etc., the Member States shall have the possibility to sustain national legislation⁵⁷.

The second paragraph in Article 18 states that the measures referred to in paragraph 1 may be taken only if the mutual assistance procedure as mentioned in Article 35 and the conditions in Article 18, second paragraph points (a) to (d) are fulfilled.

These conditions are that the national provisions have not been subjected to Community harmonization and that the Member State of establishment does not have provisions that ensure the same interests. If the Member State of establishment does have provisions that ensure the same interests, then the Member State in which the service is provided has to

⁵⁷ Sørensen (2008) p. 662

show that the provisions are either insufficient cf. point (c), or that the new provisions secure a higher level of protection cf. point (b).

5.3.1 The procedure according to Article 35

Should the Member State wish to uphold its restrictions on the free movement of services, Article 18 states that it must follow the procedure in Article 35.

First, the Member State in which the service is provided shall contact the Member State of establishment and request that measures are taken with regard to the provider. In other words, paragraph 2 imposes on the Member States a duty to give each other mutual assistance. Furthermore, the Member State in which the service is provided is to provide the Member State of establishment with sufficient information about the service and the case, in order to enable the Member State of establishment to determine the subject of the inquiry.

Subsequently, the Member State of establishment shall, within the shortest possible period of time, examine whether the provider of the services is operating lawfully according to the legislation in the Member State of establishment and verify the facts underlying the request. Regardless of whether the Member State of establishment finds reasons for taking measures against the provider of the services or not, it shall inform the requesting Member State of its decision. Presumably, the Member State of establishment is also to inform the requesting Member State of its grounds, if it were to decide not to take any measures.

Where the communication as describe above is received and the requesting Member State wishes to take measures against the provider of services, it shall notify both the Member State of establishment and the Commission cf. Article 18, third paragraph. The requesting Member State is then to state why it believes that the measures taken by the Member State of establishment are inadequate, and why it believes that the measures it intends to take fulfil the conditions as laid down in Article 18.

In accordance with Article 18, fourth paragraph, the Member State in which the service is provided cannot enforce the measures until 15 working days after it has notified the Commission and the Member State of establishment.

Whether the Member State can uphold the restrictions will be determined by the Commission cf. fifth paragraph. The Commission is to decide within the shortest possible period of time whether the Member State's restrictions are compatible with the Community Law. In the interim, the Member State in which the service is provided is permitted to uphold the restriction⁵⁸. Should the Commission decide that the restriction imposed on the provider of services is incompatible with Community Law, it shall adopt a decision requesting that the Member State in which the service is provided abolish the restriction. In urgent cases, the Member state in which the service is being provided can avoid the process set out in paragraphs 2, 3 and 4. If it does so, it is required to inform the Commission as soon as possible and give reasons why it considers the case to be urgent.

6 Recipient receives the service in another Member State

The problem discussed in the previous section of the thesis was whether a Member State can limit access to service providers from other Member States. In this section, the problems to be addressed are whether the Member State of the recipient can regulate the recipient's access to services in another Member State and the host state's ability to regulate access to services by recipients from other Member States. To illustrate problems in relation to the former, I will consider the provision of sexual services and to illustrate the latter, I will focus on receiving tour guiding services.

⁵⁸ cf. fifth paragraph, first subparagraph compared to the second subparagraph.

6.1 Prohibited restrictions

Article 16 (2) (g) of the Services Directive refers to Article 19 of the same, which contains a prohibition on imposing restrictions on the recipients of services⁵⁹. The Member States may not impose requirements on a recipient receiving services from a provider established in another Member State. Moreover, Article 19 provides two examples:

“

- (a) *An obligation to obtain authorisation from or to make a declaration to their competent authority*
- (b) *Discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.”*

It is uncertain what meaning should be give to the words “make a declaration” in (a) above. The preamble of the Services Directive states somewhat unhelpfully that:

“This also includes cases where recipients of a service are under an obligation to obtain authorisation from or to make a declaration to their competent authorities in order to receive a service from a provider established in another Member State”⁶⁰.

Article 20 of the Services Directive contains a general prohibition of “*discriminatory requirements*” based on nationality or place of residence.

The protection of the recipient’s rights as set out in Articles 19 and 20 of the Services Directive does not appear to correspond entirely with the previous case law. One possible reason for this discrepancy is the fact that the recipient is already protected by the existing jurisprudence regarding the right to travel into and stay in another Member State, so that it was not deemed necessary to deal with this issue again in the Services Directive. The leading case law in this area are the Joined Cases C-286/82 and C-26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*. In the judgment, which concerned Italian currency regulations, the ECJ concluded that not only the providers of services are covered

⁵⁹ Handbook, section 7.1.3.4, page 40

⁶⁰ Cf. 92nd Preamble recital.

by the provisions regarding the free movement of services, but also that recipients can use the right to receive services in other Member States⁶¹.

6.1.1 Example: The purchase of sexual services

On 1st January 2009 an amendment to the Norwegian General Civil Penal Code came into force with the effect that the purchase of sexual services became illegal pursuant to paragraph 202(a). The law makes paying for and receiving sexual services punishable by up to six months imprisonment⁶². Paragraph 12 of the Penal Code extends this sanction to Norwegian citizens and residents purchasing and receiving sexual services in a foreign country. The first question that arises is whether this prohibition is in conflict with the Services Directive and whether the purchase and receipt of sexual services falls under the definition of a service in the directive. Article 4 (1) of the directive states that “service” *”means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty”*.

The next question is what exactly falls into the category of “economic activity.” There are several cases in which the Court has considered the question whether immoral services can be regarded as an “economic activity.” One important decision is Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*.

Fifteen representatives of Irish student organisations were taken to court after they had distributed information about where to have abortions in the United Kingdom, abortion being illegal in Ireland at the time. One of the key issues in the case was whether abortion could be regarded as a service under the Treaty. The Court came to the conclusion that

”[...]services are to be considered to be “services” within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the

⁶¹ “It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another member state in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling of the purpose of education or business are to be regarded as recipients of services.” in: Joined Cases C-286/82 and C-26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, (Paragraph 16).

⁶² The General Civil Penal Code §202a.

*provisions relating to freedom of movement for goods, capital or persons. Indent (d) of the second paragraph of Article 60 expressly states that activities of the professions fall within the definition of services*⁶³.

*It must be held that termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity. In any event, the Court has already held in the judgment in Luisi and Carbone (Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 16) that medical activities fall within the scope of Article 60 of the Treaty.*⁶⁴”

The Society for the Protection of Unborn Children had contended that abortion should not be regarded as a service since it was “grossly immoral and involves the destruction of the life of a human being⁶⁵”. The Court’s response to this was as follows:

*”Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court’s first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally*⁶⁶. ”

With this statement, the Court leaves it up to the Member States to decide which activities can be legally exercised within the area of a Member State. In other words, the only criterion for a service to be accepted according to the definition EEC Treaty, is that it is legally performed within a Member State. Whether a service is illegal or regarded as immoral in one or more Member States will not be decisive⁶⁷.

This conclusion can be seen as a natural consequence of the fact that the European Union consists of 27 Member States and that there will always be certain activities which are illegal or regarded as immoral in one Member State but not in another. On the other hand,

⁶³ *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (Paragraph 17).

⁶⁴ *ibid* (Paragraph 18).

⁶⁵ *ibid* (Paragraph 19).

⁶⁶ *ibid* (Paragraph 20).

⁶⁷ Sørensen (2008) p. 624.

activities that are generally accepted as being of a damaging nature, such as drug dealing, will probably not be able to rely on the free movement of services anyway⁶⁸.

In Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* the Court discussed whether prostitution could be regarded as an “economic activity” in connection to the right to establishment. The case concerned six Polish citizens working as “window prostitutes” in Amsterdam. They subsequently applied for work permits in order to be able to work as self-employed prostitutes. The application was rejected by the Secretary of State responsible. The prostitutes appealed this decision but the Secretary of State dismissed their appeal on the grounds that

“prostitution is a prohibited activity or at least not a socially acceptable form of work and cannot be regarded as being either a regular job or a profession⁶⁹”.

When the case came before the Court, it was in no doubt about whether prostitution was to be regarded as an “economic activity⁷⁰” and simply referred back to the existing case law on immoral services⁷¹. Although the *Jany* case concerned the right of establishment, it seems to follow from the decision that sexual services would fall into the category of “economic activity” for the purposes of Article 50 of the Treaty and therefore also the Services Directive. Whether or not the Services Directive has an impact on the prohibition of buying and receiving sexual services in Norway lies outside the topic of this section, since I am concerned with the receiving of sexual services abroad. Nevertheless, I will briefly mention that where it is the provider who crosses a border, the host state can still

⁶⁸ See also Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* (Paragraph 32) with referral to Case C-294/82 *Senta Einberger v Hauptzollamt Freiburg*

⁶⁹ Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* (Paragraph 19)

⁷⁰ *ibid* (Paragraphs 48 and 49):

“That being so, and without it being necessary to go into the question whether, as the United Kingdom Government submits, prostitution can be regarded as a commercial activity, it is sufficient to hold that prostitution is an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods.”

“Consequently, prostitution is a provision of services for remuneration which, as indicated in paragraph 33 above, falls within the concept of ‘economic activities’.”

⁷¹ *ibid* (Paragraph 56)

impose Cassis de Dijon style restrictions or restrictions based on Article 28 of the Treaty in areas which are not harmonised⁷²⁷³.

6.1.1.1 Prohibition of receiving a service in another Member State

As mentioned earlier, the legal sanctions also apply where Norwegian citizens or residents receive sexual services abroad, cf. General Civil Penal Code §§202a and 12. Under EU law, the position of recipients who travel to another Member State specifically in order to receive a service which is completely prohibited in their own Member State is not clear⁷⁴. However, this question has been debated in the national courts of both Ireland and England. The first case which dealt with this point in some detail was *The Attorney General v. X and Others*⁷⁵, which concerned a 14 year old Irish girl (hereinafter X) who became pregnant as a result of being raped. X's parents took her to London to have an abortion, while also hoping that tissue collected from the foetus would provide the necessary evidence to convict the suspected man.

When the news reached the Irish Attorney General, he obtained an injunction from the High Court in Dublin to prevent the girl from travelling to London in order to get the abortion. X and her parents, who at this stage were already in London, had to travel back to Ireland to wait for the case to be heard. The Supreme Court initially considered the concept of services as defined in the Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, before looking at the possibility of denying the recipients of services the right to travel abroad. In this context, the court referred to Case 30/77 *Régina v Pierre Bouchereau*, in which a French citizen had been arrested for possession of drugs in the United Kingdom. The question here was whether a person could be expelled if he or she posed a threat to national public order, public security or public health. The decision in this case was based on Directive 64/221/EEC on the right

⁷² Sørensen (2008) page 641.

⁷³ See also Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*

⁷⁴ Sørensen (2008) page 642. This view seems to be shared by Prof. Mag. Dr. Lengauer at the institute for European Law at the University of Vienna.

⁷⁵ The case is published under the title *The Attorney General v. X and Others* [1992 No. 846P] in the Incorporated Council of Law Reporting for Ireland (1992).

to travel and stay in another Member State, the scope of which is defined in its Article 1 as follows:

”[This directive] shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services”.

The Court held that in order to rely on a threat to national public order to expel an individual, a Member State had to show that the person in question posed a genuine and sufficiently serious threat to one of the fundamental interests of a society⁷⁶.

In *The Attorney General v. X and Others*, the judge in the High Court judge had ruled that since circumstances varied over time and from country to country, Member States should be given some freedom in interpreting the concept of public policy⁷⁷. He further stated that Community law had accepted the need to recognise cultural differences between Member States⁷⁸. The case culminated with X threatening to commit suicide and the Supreme Court overturning the High Court’s decision, lifting the injunction. However, the majority based its decision not on EU law, but on Article 40.3.3 of the Irish Constitution, which permitted abortion in cases where there was a “real and substantial risk to the life as distinct from the health of the mother, which can only avoided by the termination of a pregnancy.” At the time of the decision, there was substantial public debate in Ireland about abortion, but also about the Maastricht Treaty. It is possible that the Supreme Court based its decision on the Irish Constitution, rather than on any provision of EU law, in order not to influence the Irish Maastricht debate⁷⁹.

The second case, *R. v Human Fertilisation & Embryology Authority ex p. Diane Blood* dealt with the question of whether it was permissible to travel to another Member State to receive artificial insemination. Mr. And Mrs. Blood were trying to conceive when Mr. Blood contracted meningitis and fell into a coma. On Mrs. Blood’s request, doctors subsequently obtained samples of his sperm. Since he was in a coma, the doctors were

⁷⁶ Case C-30/77 *Regina v. Pierre Bouchereau*, 3rd paragraph of the decision.

⁷⁷ *The Attorney General v. X and Others* [1992 No. 846P], p. 14

⁷⁸ *ibid*, p. 15

⁷⁹ See Bernard (2007) p. 362 to 365 for more information about the Irish abortion and European Community law.

unable to obtain his prior written consent to the procedure, as required by national legislation, with the effect that Mrs. Blood could not use the samples for IVF treatment in the United Kingdom. Mr. Blood died shortly afterwards. Later, Mrs. Blood wanted to travel to Belgium, where there was no consent requirement. In the absence of Mr. Blood's consent, the UK authorities refused to hand the sperm samples over to Mrs. Blood. In the Court of Appeal, the Master of the Rolls accepted that refusing Mrs. Blood access to her husband's sperm samples in effect prevented her from having the service performed in another Member State. He took the view that "*given the ethical and moral considerations raised by artificial insemination, the UK was justified in taking measures to prevent abuse and undesirable practices from occurring*"⁸⁰. However, he also found that the Human Fertilisation and Embryology Authority had failed to take into account Article 49 of the Treaty. The authority subsequently changed its decision and Mrs. Blood was eventually allowed to travel to Belgium to receive IVF treatment.

As mentioned earlier, the law at present is not clear on the position of recipients who travel to another Member State specifically in order to receive a service which is completely prohibited in their own Member State. Whether and how restrictions on receiving sexual services abroad will be legitimised, depends on what the restrictions are based on. Restrictions could in theory be legitimised in one of three ways: under Article 29, under Article 49 or in a reverse application of the Cassis de Dijon case law⁸¹. Since it would go beyond the scope of this thesis to discuss all three of these possibilities, I will focus on the case law in relation to Articles 49 and 50.

In Case C-424-97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* the Court summarised the criteria to be fulfilled in order to justify a restriction as follows:

"According to the Court's case-law, national measures which restrict the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by

⁸⁰ Barnard (2007) p. 366

⁸¹ Sørensen (2008) p. 641. Note: Sørensen uses this argument in regard to restricting services access to a market.

*overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective[...]*⁸²”

Moreover, the Court has made it a condition of imposing restrictions that the interest to be protected by the restriction does not already enjoy sufficient protection under the laws of the other Member State⁸³.

When considering whether the Norwegian criminal sanction is necessitated by the “imperative requirements in the general interest”, one needs to examine the preparatory works to the legislation in order to determine which interest the law is designed to protect. It follows from the preparatory works that the interest the prohibition seeks to protect is the prevention of human trafficking. An additional goal of the general prohibition is a reduction in new clients using prostitutes, thus preventing a growth in the market for prostitutes⁸⁴.

With regard to buying sexual services abroad, the justice department states that sexual exploitation and human trafficking are to a high degree international problems and that the prohibition may contribute to a change of attitudes, bearing in mind that there is ample evidence to suggest that in most cases, Norwegian men first use prostitutes while abroad⁸⁵.

As mentioned in section 3.2.2, the Court has already recognised numerous “imperative requirements in the general interest.” In the Joined Cases C-49/98, C-50/98, C-52/98 to C-

⁸² Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* (Paragraph 57)

⁸³ Sørensen (2008) p. 632 and Arnesen, *Tjenestedirektivets betydning for norske forbrukere* (Unpublished,) section 2.2.

⁸⁴ St.prp. nr 48 (2007-2008), section 5.2.3:

”det er nødvendig med et generelt forbud mot kjøp av seksuelle tjenester for å kunne ramme kjøp av seksuelle tjenester fra ofre for menneskehandel. Et generelt forbud vil også kunne bidra til å svekke rekrutteringen av nye kunder, og dermed hindre at prostitusjonsmarkedet stadig øker”

⁸⁵ St.prp. nr 48 (2007-2008), section 5.4.3:

”seksuell utnyttelse og menneskehandel i høy grad et internasjonalt problem. Den foreslåtte bestemmelsen kan også bidra til å skape en holdningsendring fordi det er grunn til å tro at mange norske menn kjøper sex for første gang i utlandet”.

54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Ld.a (Finalarte)*⁸⁶, the Court held that it was a matter for national courts to decide whether a particular restriction was suitable to protect a given interest. Despite this, the Court retained the power to decide whether or not an interest was worth protecting⁸⁷. It can be concluded that combating sexual exploitation and human trafficking would be recognised by the Court as interests worth protecting⁸⁸⁸⁹.

On 17th January 2008, Norway ratified⁹⁰ the Council of Europe's Convention on Action against Trafficking in Human Beings. The aim of the convention is to prevent and combat national and international human trafficking⁹¹. The Norwegian preparatory works to the convention state that the convention comes into force when it has been ratified by ten countries, at least eight of which must be members of the European Council. At present, the convention has been ratified by 22 countries, 12 of which are members of the European Council. The convention came into force on 1st February 2008⁹². This raises the question whether the prevention of human trafficking is already sufficiently protected in the home state of a provider of sexual services, where that state is a signatory to the convention. Another question that arises in relation to the Norwegian prohibition is whether it is proportional to the interest it is trying to protect and whether it is suitable to achieve its aims. The preparatory works to the Norwegian prohibition are ambiguous about the precise aims of the legislation, since it is not clear whether the intended target is Norway's role in the international prostitution market or the international prostitution market itself. If the latter, it seems difficult to argue that the prohibition is suitable to achieve this aim.

⁸⁶ Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte Sociedade de Construção Civil Ld.a (Finalarte)*

⁸⁷ Craig & De Búrca (2008), p. 828.

⁸⁸ On the 1st January 1999 a general prohibition against buying sexual services came into force in Sweden. In Finland, buying sexual services is allowed provided that the prostitute is not a victim of human trafficking. See also Ot. Prp. Nr. 48 (2007-2008)

⁸⁹ Prostitution is today illegal in the following Member States within the EU: Lithuania, Malta, Romania, Slovenia and Sweden.

Source: [Wikipedia](#)

⁹⁰ http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Profiles/NORWAYProfile_en.asp

⁹¹ St. prp. Nr. 2 (2007-2008), section 1.1

⁹² http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp

6.1.2 Example: Tour Guiding Services

In cases where both the provider and the recipient of services are established in the same Member State but the service is in fact provided in another Member State, it is questionable whether such a service can properly be characterised as border crossing. The Court discussed this issue in the so-called tourist guide cases⁹³, which all involved the situation where a Member State requires tourist guides to be nationally accredited. In the case of Case C-154/89 *Commission vs. France* the reason given for requiring accreditation was *“the protection of general interests relating to the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of the country”*⁹⁴.

The Court described two different permutations of how a tour company or tourist guide might offer his services in another Member State⁹⁵ and concluded that in both cases there was a border crossing activity under Article 49⁹⁶. The Court further held that the French requirement of accreditation was a restriction under Articles 49 and 50⁹⁷.

The next question addressed by the Court was whether there were “imperative requirements in the general interest” which were not yet sufficiently protected in the other Member State and whether the same result could be achieved with lesser restrictions. The conclusion reached by the Court was that although the French interest could justify a restriction, the requirement of accreditation went beyond what was necessary to achieve its objective. The Court took the view that the competitive nature of the tourist guide market already acted as a sufficient control on the quality of tour guiding services.

⁹³ Case C-154/89 *Commission vs. France*, Case C-189/89 *Commission vs. Italy* and Case C-198/89 *Commission vs. Greece*

⁹⁴ Case C-154/89 *Commission vs. France*, (Paragraph 16)

⁹⁵ *ibid* (Paragraphs 6 and 7)

⁹⁶ *ibid* (Paragraph 10)

⁹⁷ *ibid* (Paragraphs 12 and 13)

7 Rules on Information

The Service Directive contains various rules about the provision of and access to information. These can be split into two categories: those directed at the providers and recipients of services and those aimed at encouraging co-operation between Member States. In the following, I will not be dealing with the rules aimed at Member States, even though, strictly speaking, they do benefit consumers to the extent that they enable Member States to exchange information about the quality of service providers. I am adopting this approach for two reasons; firstly, the rules on administrative co-operation are outside the topic of my thesis and secondly, they will not result in any major changes to the current law⁹⁸. At the end of this section, I will briefly mention how the points of single contact will work in some of the Member States.

7.1 Simplification of administrative procedures

From the point of view of the service provider, the biggest change brought about by the Services Directive is the administrative simplification in Chapter 2. The Member States are obliged to establish points of single contact. For the providers of services this means that they will now only have to address a single authority in order to complete the procedures and formalities required by a Member State before they can provide services in that state. The points of single contact will not only benefit service providers who are established in other Member States, but also those service providers who are already established in the Member State where the service is being provided. In order to make access for visiting providers of services easier, the Member States are encouraged to make sure that the information that is available at the points of single contact is also accessible in other languages than the one spoken in the Member State.

⁹⁸ See in this context Regulation No. 2006/2004 on consumer protection cooperation

Moreover, Article 7 (3) requires Member States to ensure that the information listed in Article 7 (2) and 7 (3) is “easily accessible at a distance and by electronic means.” This provision needs to be read together with Article 8. Article 7 (4) obliges Member States to also ensure that the requests for or information or assistance received by the points of single contact are dealt with as quickly as possible.

In order to facilitate access to information, service providers are under a duty to provide information. Article 22 distinguishes between information disclosure of which is mandatory cf. Article 22 (1) and information disclosure of which is dependant on a request being made by the recipient cf. Article 22 (3).

7.1.1 Mandatory Information

Under Article 22 (1) (a to d), the service provider is obliged to make the following basic information available to the recipient: his name, his contact information, whether he is a member of a registered trade, whether the service is subject to an authorisation regime in his home state and whether he carries out an activity that is subject to VAT. In addition, the provider of services shall provide information regarding the service itself, such as general conditions and clauses, the price of the service if it is predetermined, insurance details and the existence of contractual clauses specifying jurisdiction cf. Article 22 (1) (a to k).

Member States shall ensure that the provider gives this information on his own initiative cf. Article 22 (2). In addition, the recipient shall have access to this information at the place where the service is provided or where the contract for services is concluded. He shall also have access to it electronically and the information shall be contained in all documents provided to the recipient which set out a detailed description of the service⁹⁹.

⁹⁹ Article 22 (2) (a to d).

7.1.2 Information to be provided to the recipient upon request

Upon request from the recipient, the service provider shall supply him with the further information including price calculations in cases where the price is not predetermined. In cases where the service provider is subject to a professional code of conduct, he shall also provide upon request details about the standards he is required to meet under that code as well as details of where the recipient can gather further information about the relevant code.

The Member States shall ensure that the information the provider must supply is given to the recipient in a clear and unambiguous manner and in good time, either before the contract is concluded or, in cases where there is no written contract, before the service is provided. There is a further duty on part of the Member States to ensure that service providers comply with their obligations to provide information and to ensure that the information which is supplied is correct¹⁰⁰.

7.2 The recipient's right to information

As mentioned above, Article 22 requires Member States to take the general measures necessary to ensure that service providers make information about themselves and the service available to the recipient. The information listed in Article 22 (1) has to be provided on the service provider's own initiative, whereas the information listed in Article 22 (3) shall be supplied upon request by the recipient. Under Article 22, the recipient shall be able to access this information regardless of his location.

Cases may arise where a recipient wishes to obtain more information about the professional standards a provider is subject to and possible boards of complaint. The recipient can access this information through points of single contact, cf. Article 21. Article 21 of the directive imposes obligations on the Member States to assist the recipient in obtaining this information.

¹⁰⁰ Cf. Article 27 (2).

According to the English¹⁰¹ and German¹⁰² language versions of the Directive, the obligation to provide information only applies in the Member State where the recipient resides, while the Danish version uses the formula “*recipients in the Member State where they are staying*”. It follows from the Danish version of the handbook that this discrepancy was probably not intended and that the duty is on the Member State of residence and not the Member State where the recipient is staying.

7.2.1 Situations where the recipient requests information before travelling to another Member State

One of the obstacles to the free movement of services is the recipient’s lack of information about service providers in other Member States and the services they provide. Thus, recipients have frequently been unaware of the requirements to which a foreign service provider is subject as well as his own consumer protection rights. This has made it difficult for recipients to choose service providers in other Member States, since they do not have sufficient information to compare the various services available to them. The principal objective of Article 21 of the Services Directive is to engender in recipients greater trust in service providers from other Member States by providing them with better access to information about these. This information includes the standards applied to service providers in other Member States as well as consumer protection laws in those states¹⁰³.

The points of single contact will also be able to inform recipients of the means of redress in cases where there is a dispute between the recipient and the provider¹⁰⁴ as well as contact details of associations and organisations which may be able to provide practical assistance to the recipient¹⁰⁵. The authorities are obliged to supply this information in a clear and unambiguous manner and to make it available electronically. If necessary, the authorities

¹⁰¹ “Member States shall ensure that recipients can obtain, in their Member State of residence, the following information”.

¹⁰² “Die Mitgliedstaaten stellen sicher, dass die Dienstleistungsempfänger in ihrem Wohnsitzstaat folgende Informationen erhalten”.

¹⁰³ Article 21 (1) (a)

¹⁰⁴ Article 21 (1) (b)

¹⁰⁵ Article 21 (1) (c)

shall provide the recipient with a step-by-step guide. The Member State has no obligation to provide judicial assistance to the recipient nor to obtain detailed information which is unique to the individual recipient¹⁰⁶. There is no requirement in the directive for Member States to create new databases to deal with such unique requests or for the point of single contact to be in possession of the entirety of information available about each service provider. Information shall be supplied within a reasonable time frame¹⁰⁷.

7.2.2 Situations where the recipient requests information while being in another Member State

As mentioned in section 6.2, cases where the recipient is in a Member State other than his state of residence do not fall under Article 21 (1). For instance, one can envisage a situation where a recipient wants to receive a service in another Member State which is being offered by a provider established in a third Member State. To limit the recipient to access to information through the point of single contact in his state of residence not only makes it more difficult for recipients to obtain information, but also indirectly creates potential barriers to the free movement of services. Although the points of single contact will be permitted to receive payment for the access to information¹⁰⁸, this will not be regarded as a service and they will not themselves be regarded as service providers¹⁰⁹. From the recipient's perspective, this means that he is not protected by the prohibition of discrimination based on place of residence contained in Article 20 because this prohibition only applies to services.

However, this does not completely exclude any right of the recipient to obtain information in a Member State other than his state of residence. A parallel can be drawn to Case C-186/87 *Ian William Cowan v Trésor public*.

Cowan, a British citizen, was the victim of a violent attack in the Paris metro. As he did not recognise his assailant, he applied for criminal injuries compensation from the French authorities. The application was rejected on the basis that Cowan was not a resident of a

¹⁰⁶ Handbook, section 7.2.3.1, p. 46.

¹⁰⁷ Article 21 (3) of the Service Directive.

¹⁰⁸ Cf. the 49th recital in the Preamble of the Services Directive.

¹⁰⁹ Article 4 (2) (i).

Member State that had entered into a mutual agreement on criminal injuries compensation with France. The Court decided that this refusal to pay compensation was discrimination contrary to Article 12 since¹¹⁰ Cowan should be regarded as the recipient of services by virtue of the fact that he was in France as a tourist¹¹¹. Despite the fact that his situation is not covered by the Services Directive, a recipient who stays in another Member State will therefore probably be entitled to the same information as in his state of residence on the basis of Articles 12 and 49.

7.3 The Administrative Simplification in some of the Member States

In Norway, the government recently announced its approval of the Services Directive. In most of the Member States, there is now a debate on what form the points of single contact shall take. So far, Norway, Finland and Denmark are planning on creating a common point of single contact. In Norway, the idea is to use Altinn (<http://www.altinn.no>) as the point, whereas Finland is planning to use FöretagsFinland (<http://www.yritssouimi.fi>) and Denmark the internet portal www.virk.dk.

Another group of Member States who are co-operating with each other are Estonia, Latvia and Great Britain.

There has also been a debate in the different Member States on what tasks the points of single contact are to handle. Finland, Denmark and Poland have so far signalled that their points of single contact will perform the mandatory duties that are listed in the Articles 6, 7 and 8, as well as recipients' requests for information as mentioned in Article 21.1.

In Norway, Lithuania and Ireland, the points of single contact will probably only perform the mandatory duties.

¹¹⁰ Case C-186/87 *Ian William Cowan v Trésor public* (Paragraph 15)

¹¹¹ *Ibid* (Paragraph 17)

8 Law of contract

In a contractual relationship between a consumer and a professional seller, the consumer often tends to end up as the “weaker party”. A remedy which is frequently used by legislators is to incorporate consumer protection rules into contracts by implication.

According to the Services Directive Article 3 (2) private international law is not affected by the Services Directive. A careful reading of the paragraph suggests that, in implementing the directive, Member States are not to alter their consumer protection rules.

9 Liability insurance and guarantees

In some instances, the service provided may represent a health or safety risk, not only for the recipient but also for a third party. The intention behind Article 23 is to give the Member State in which the service is provided the possibility to ensure that the provider of services is sufficiently covered by insurance in such cases.

The Member States can demand that the provider of services is covered by a liability insurance in cases where the service offered represents a “direct and particular risk” to “health and safety” as defined in the fifth paragraph.

Quite often, the situation will be that the provider of services is already covered by a liability insurance in the Member State of establishment. In principle, this will be sufficient and the Member State in which the service is provided is to refrain from demanding that the provider takes out additional liability insurance, forcing the provider to have an overlapping insurance¹¹². Reading second paragraph of Article 23 in light of Article 26, it can be seen that the Member States shall recognise professional liability insurances and guarantees issued in another Member State.¹¹³

However, if the Member State in which the service is provided regards the liability insurance issued in the Member State of establishment as insufficient to meet its standards,

¹¹² Handbook, section 8.2.2, p. 48.

¹¹³ Ibid

it can demand that the provider subscribes to an additional liability insurance to cover the difference¹¹⁴¹¹⁵.

In those cases where the recipient of services travels to a different Member State in order to receive a service from a provider that is established in the Member State where the service is provided, the provider will already be covered by a liability insurance in that Member State. However, the situation is different again where the provider of services is established in the same Member State as the recipient and they travel together to a different Member State in order to perform the service there. If the service should present a direct and particular risk to the health or safety of a third person, the host state has the possibility to require that the provider signs an additional guarantee to cover the difference between those aspects that are already covered in his state of establishment and those aspects that the host state requires to be covered cf. Article 23 (1).

10 Distinctive boards for the settlement of disputes

An important aspect of the principle of transparency and the protection of consumers is information about the possibilities to lodge complaints. A natural consequence of this is Article 27 of the directive, which requires Member States to ensure that the providers of services make available their legal address or, where appropriate, information on any non-judicial means of redress that may be available to the consumer¹¹⁶. Article 27 in the Services Directive must be viewed in connection with Regulation 2006/2004 on the establishment of a network of consumer authorities in the Member States.

While the Regulation imposes duties on the Member States to co-operate with each other and to provide information to consumers¹¹⁷, the Services Directive imposes obligations on the Member States to ensure that providers give the consumers information.

¹¹⁴ Sørensen (2008) p. 667

¹¹⁵ Arnesen, *Tjenstedirektivets betydning for norske forbrukere (Unpublished)*, section 4.5.

¹¹⁶ Sørensen (2008) p. 669.

¹¹⁷ Council Reg. Nr. 2006/2004 on consumer protection cooperation, Article 4(8).

Firstly, the Member States shall take the measures necessary to ensure that the provider of services supplies contact details that the consumer can use to complain about the service or to request further information about the service provided¹¹⁸. Secondly, the Member States have to ensure that the service provider responds to the complaints in the shortest possible time and makes the best possible efforts to ensure a satisfactory solution. The Member States are under a further obligation to make sure service providers inform the recipient of any professional bodies or trade associations which they belong to and what, if any, non-judicial methods of redress these bodies offer the recipient. The service provider shall include this information shall in all correspondence with the recipient.

10.1 Non-judicial bodies

Within the EU there are many different non-judicial bodies engaged in settling disputes. The European Consumer Centres Network is an EU wide network of such bodies which provide swift and inexpensive methods of redress for consumers. An increase in border crossing trade means that these bodies have taken on a greater significance in recent years¹¹⁹. Figures obtained from Forbruker Europa, which is part of the European Consumer Centres Network, show that in 2007 they received 1272 complaints from Norwegian citizens purchasing goods or services in other Member States¹²⁰. It is outside the scope of this thesis to deal with all non-judicial bodies within the EU, so in the interests of simplicity, I will focus on Forbrukertvistutvalget including Forbrukerrådet and Inkassoklagenemnda.

¹¹⁸ Article 27 (1) of the Service Directive.

¹¹⁹ Overview on the percentage of EU residents that engage in border crossing trade.
http://ec.europa.eu/consumers/publications/factsheet-ECC-Net_en.pdf

¹²⁰ Forbruker Europa's statistics over complaints for 2007.
<http://www.forbrukereuropa.no/artikler/klagestatistikk>

10.1.1 Forbrukerrådet and Forbrukertvistutvalget

According to the forbrukertvistloven¹²¹ the relevant authority, the forbrukertvistutvalget, is only competent to handle disputes regarding consumer purchases, disputes regarding services provided by skilled workers in accordance with the Act on services provided by skilled workers (*håndverkertjenesteloven*) and disputes regarding agreements in accordance with the Act on cancellation rights (*angrerevtloven*).

Paragraph 4 of the Forbrukertvistloven requires a consumer who is party to a dispute to submit a written application to Forbrukerrådet. Paragraph 5 requires Forbrukerrådet to ensure that there is sufficient evidence to settle the dispute, which includes obtaining the opinion of an expert to the extent that this is possible using reasonable means. The role of Forbrukerrådet is to arbitrate between the parties¹²² and ensure that they reach a satisfactory solution to their dispute¹²³. If no such solution is achieved, each of the parties has four weeks from the date on which they were informed of Forbrukerrådet's decision to close the case to submit a further written application to Forbrukerrådet to have the case referred to Forbrukertvistutvalget cf. Forbrukertvistloven, paragraph 6.

Forbrukertvistutvalget completes the handling of the case in a written decision cf. paragraph 10. Either party can appeal this decision by issuing a writ of summons in a court of law within four weeks of the decision being handed down cf. paragraph 11 (1). If the case has not been taken to court within the four week deadline, the decision of Forbrukertvistutvalget will be treated as a final decision.

¹²¹ Lov av 28. april 1978 nr. 18 § 1 (Please note that I have been unable to locate an official translation and have therefore decided to refer to this by its Norwegian name.)

¹²² Forbrukertvistloven § 5 (2)

¹²³ Forbrukertvistloven §§ 6 jfr. 5 (2)

10.1.2 Inkassoklagenemnda

Debt collection cases are dealt with by Inkassoklagenemnda. It is set up by an agreement between a body of debt collectors and Forbrukerrådet cf. Debt Collection Act, paragraph 22. Before Inkassoklagenemnda can decide on a case, two conditions need to be satisfied. First, the debtor needs to show that he has a factual interest in the case being handled by Inkassoklagenemnda¹²⁴ and secondly, Inkassoklagenemnda must be competent to handle the dispute. Whether or not Inkassoklagenemnda is competent to handle the dispute depends on paragraph 22 (1), which states that that it is empowered to handle disputes between debtors and debt collectors arising from obligations in the Debt Collection Act¹²⁵. Paragraph 5 (4) provides that it can be made a condition of authorisation to act as a debt collector, that the company applying for authorisation is a member of the body referred to in paragraph 22. However, in reality, membership of Inkassoklagenemnda is always imposed as a condition of authorisation¹²⁶.

10.2 The recipient's right to bring an action in court

In some cases the recipient will be left with no other option in pursuing his claim than to take legal action against the provider of services. This can either be due to the fact that no qualified board for the settlement of disputes exists (be it in the Member State of the consumer or in the state of the provider¹²⁷) or simply because the provider and the recipient have not managed to come to a satisfactory solution. The recipient will then have to go through the court in order to pursue claim.

¹²⁴ Debt Collection Act. Paragraph 22 (3)

¹²⁵ "[...]tvister om forpliktelser etter denne loven mellom skyldnere og foretak som driver inkassovirksomhet".

¹²⁶ Wikborg Rein, *Tjenestedirektivet og Forbrukerrettigheter* (2008), p. 41.

¹²⁷ The European Consumers Centres Network can help the consumers in finding and accessing bodies for out-of-court settlement disputes in other Member States. However, in some cases there are no existing bodies to handle the disputed service, or the foreign body does only accept complaints from residents in that Member State, such as the [Austrian Internet Ombudsman](#).

Jurisdiction is determined by either the Brussels Convention¹²⁸ or the Lugano Convention¹²⁹, depending on whether the defendant is resident in a country that is a Member of the European Union or an EEA country. In those cases where both the claimant and the defendant are domiciled in a Member State of the EU, the Brussels Convention will apply cf. the Lugano Convention Article 54(b) (1). If the defendant is resident in an EEA country, the Lugano Convention will apply cf. Article 54(b) (2) of the convention. Since the thesis primarily deals with EU law, I will assume in the following that both the provider and the recipient are domiciled within the European Union.

If the recipient/consumer is a resident of a Member State of the EU, Article 16 of the Brussels Convention allows him to issue proceedings against the provider either in his own Member State, or in the Member State where the provider is resident. In those cases where the consumer is being sued, the lawsuit can only be brought in the Member State where the consumer is resident, unless otherwise agreed upon after the dispute has arisen.

11 Conclusion

As this thesis has shown, the directive may in some cases result in a change and development of the legal position of consumers, but whether the change is of significance appears uncertain.

A genuine internal market for services will, in principle, lead to a more competitive and efficient market, which consumers should benefit from in terms of greater options, higher quality of services and lower prices. This is basic market theory. The directive aims to achieve this by removing national administrative obstacles for the provider of services, as well as limiting the host states' ability to impose restrictions.

¹²⁸ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹²⁹ 88/592/EEC: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988

On the other hand, the result of the directive is that the host state can only impose restrictions when it concerns the safety of consumers¹³⁰, while the protection of other consumer interests, such as the protection of the consumer's economic interests falls out of the scope of the directive – unless one chooses to interpret “public policy” in Article 16 in a very broad sense to include the economic interest of consumers.

At first inspection of the directive, one might be misled into believing that market integration has suffered at the expense of consumer interests. However, there are a few considerations that have to be taken into account. Firstly, it is important to remember that an integrated market for services is in the consumer interest in itself, as it results in wider competition and choices for the consumers. Some will gain bigger benefits from this than others and perhaps some will not gain from it at all. But the starting point is still that a greater variety leads to better options for consumers. Secondly, the Services Directive has allowed that some provisions of services can be excluded from the free movement of services¹³¹. The Member States will therefore have the possibility to exclude individual services from the scope of the directive in order to protect special consumer interests. Thirdly, consumer interest can also be anchored in other interests, such as requirements regarding interest in the environment, interest in the public health etc. Whether one chooses to view requirements of qualification for electricians as a requirement of safety or a consumer interest is therefore a matter of opinion.

With regard to information, the directive is a positive development for consumers. Through the points of single contact, consumers will be able to get information about what requirements are applicable to foreign providers, as well as how one should proceed in case a dispute arises. Furthermore, the providers are obliged to submit information about themselves and the service that they provide on their own initiative. Considering that one of the aims of the directive was to increase the recipient's trust in providers of services from other Member States through information about the provider and the service itself, this

¹³⁰ See Articles 16 and 18

¹³¹ See Articles 2 and 17

appears as a positive development. However, one must keep in mind that the more complex the services are, the more complex the information. This might result in some consumers not being able to utilize the information. Furthermore, it must be questioned whether information alone is enough to gain the trust of consumers. In my opinion, as the directive does not contain clear rules about out-of-court settlements, it will not create greater trust on the part of consumers. The scepticism towards trading in a foreign country will not disappear on the implementation of the Services Directive. There are too many obstacles such as language difficulties, cultural barriers and concerns about how to proceed if one is not content with a service for that to happen. Where such problems occur, it is simply easier to choose the safe option and trade in your own country.

How much significance the directive will have for consumers therefore seems uncertain. As mentioned above, it contains positive elements such as the rules on access to information. Despite the high expectations, specifically in so far as it is expected to lead to greater access to services for consumers, it appears that the directive will not live up to its promise. Since the directive to a large extent represents a codification of the applicable law, it is tempting to ask what difference it makes to dress it in new clothes?

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Ot.prp.nr.36 (2004-2005)	Om lov om endringer i lov 21. desember 2000 nr. 105 om opplysningsplikt og angrerett mv. ved fjernsalg og salg utenfor fast utsalgssted (angrerettloven).
Ot.prp. nr.48 (2007–2008)	Om lov om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.).
St.prp. nr. 2 (2007–2008)	Om samtykke til ratifikasjon av Europarådets konvensjon 3. mai 2005 om tiltak mot menneskehandel.
St. prp. Nr 34 (2008-2009)	Om samtykke til deltakelse i en beslutning i EØS-komiteen om innlemmelse i EØS-avtalen av direktiv 2006/123/EF om tjenester i det indre marked

(tjänstedirektivet).

Swedish preparatory legislation

Ds 2008:75

Genomförande av tjänstedirektivet. Stockholm, 2008

Treaties and conventions

EEC Treaty

Treaty establishing the European Economic Community of 25th of March 1957, consolidated text

Directives and regulations

Council Dir. 64/221/EEC

Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

Council Dir. 84/450/EEC

Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

Council Dir. 85/374/EEC

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

Council Dir. 85/577/EEC

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

Council Dir. 87/102/EEC

Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States

concerning consumer credit.

Council Dir. 89/552/EEC

Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

Council Dir. 90/314/EEC

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

Council Dir. 93/13/EEC

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

Council Reg. 44/2001

Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Regulation 2006/2004

Regulation No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

Council Dir. 2006/123/EC

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

Table of cases

(Most cases were found on the webpage of the European Court. As far as the cases have been in the European Court Reports, this information will be listed)

Case C-33/74	<i>Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid</i> ECR [1974] Page 1299
Case C-30/77	<i>Régina v Pierre Bouchereau</i> ECR [1977] Page 01999
Case C-120/78	<i>Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein</i> ECR [1979] Page 649
Case C-240/81	<i>Senta Einberger v Hauptzollamt Freiburg</i> ECR [1982] Page 03699
Joined Cases C-286/82 and 26/83	<i>Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro</i> ECR [1984] Page 377
Case C-205/84	<i>Commission of the European Communities v Federal Republic of Germany</i> ECR [1984] Page 3755
Case C-186/87	<i>Ian William Cowan v Trésor public</i> ECR [1989] Page 00195
Case C-113/89	<i>Rush Portuguesa Lda v Office national d'immigration</i> ECR [1990] Page I-01417
Case C-154/89	<i>Commission of the European Communities v French</i>

Republic ECR [1991] Page I-00659

- Case C-189/89 *Commission of the European Communities v Italian Republic* ECR [1991] Page I-00709
- Case C-198/89 *Commission of the European Communities v Hellenic Republic* ECR [1991] Page I-00727
- Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* ECR [1991] Page I-04007
- Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* ECR [1991] Page I-04221
- Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* ECR [1991] Page I-04685
- Case C-106/91 *Claus Ramrath v Ministre de la Justice, and l'Institut des réviseurs d'entreprises* ECR [1992] Page I-03351
- Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* ECR [1994] Page I-01039
- Case C-375/92 *Commision vs. Spain* ECR [1994] Page I-00923
- Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* ECR [1994] Page I-03803
- Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECR [1995] Page I-04165

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Case C-210/96	<i>Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung ECR [1998] Page I-04657</i>
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Case C-424/97	<i>Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein ECR [2000] Page I-05123</i>
Case C-58/98	<i>Josef Corsten</i>
Case C-67/98	<i>Questore di Verona v Diego Zenatti</i>
Case C-268/99	<i>Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie</i>
Case C-36/02	<i>Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn</i>
Other cases:	
[1992] No. 846P	<i>The Attorney General v. X and Others</i>
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Other material and web pages

COM/2000/51 final	Green paper from the Commission, <i>Legal aid in civil matters: The problems confronting the cross - border litigant</i>
COM/2002/0441 final	Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services
COM/2002/0441 final	Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services.
Handbook	Handbook on the implementation of the Services Directive (2007)
Master thesis at UiO	Grenseoverskridende byggetjenester(2007)
ECC-Net	http://ec.europa.eu/consumers/redress_cons/index_en.htm
EUR-LEX	http://eur-lex.europa.eu/da/index.htm
Europa Institute Mitchell Working Paper Series	http://www.law.ed.ac.uk/mitchellworkingpapers/papers.aspx
The Court of Justice of the European Communities	http://curia.europa.eu/jcms/jcms/Jo1_6308/curia
The European Consumer Centre Norway	http://forbrukereuropa.no/

Annex (optional)